88-42

No.

In the Supreme Court of the United States

October Term, 1987

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIM T. BUCKLEY
MICHAEL J. ESLER

Esler, Stephens & Buckley
101 S.W. Main Street
Suite 1870
Portland, OR 97204-3226

Attorneys for Petitioners

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MARY E. HALLSTROM, Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Olaf A. and Mary E. Hallstrom petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-8a) is reported at 831 F.2d 889 (1987). The amended opinion of the court of appeals (App. B, infra, 9a-17a) is reported at 844 F.2d 598 (1988). The opinion of the trial court (App. C, infra, 18a-19a) on the question presented is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a-8a) was entered on November 3, 1987. A timely petition for rehearing was denied and an amended judgment (App. B, infra, 9a-17a) was entered on April 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

Section 7002 (b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (b) (1982 ed., Supp III), provides:

(b) Actions prohibited

(1) No action may be commenced under subsection (a) (1) (A) of this section -

(A) prior to 60 days after the plaintiff has given notice of the violation to -

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, or order

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter [Hazardous Waste Management]; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance

with such permit, standard, regulation, condition, requirement, prohibition, or order. In any action under subsection (a) (1) (A) of this section in a court of the United States, any person may intervene as a matter of right.

EPA Regulations on Prior Notice of Citizen Suits [under RCRA], 40 C.F.R. § 254 (1988) are set forth in App. D, infra, 20a-23a.

The following statutes contain identical or substantially similar 60-day notice provisions for citizen suits:

1. Section 505(b) of the Clean Water Act, 86 Stat. 816, 33 U.S.C. § 1365(b) (1982 ed.).
2. Section 304(b) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 7604(b) (1982 ed.).
3. Section 105 (g) (2) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415 (g) (2) (1982 ed.).
4. Section 12(b) of the Noise Control Act of 1972, 86 Stat. 1243, 42 U.S.C. § 4911(b) (1982 ed.).
5. Section 16(b) of the Deepwater Port Act of 1974, 88 Stat. 2141, 33 U.S.C. § 1515(b) (1982 ed.).
6. Section 1449(b) of the Safe Drinking Water Act, 88 Stat. 1690, 42 U.S.C. § 300j-8(b) (1982 ed.).
7. Section 520(b) of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U.S.C. § 1270(b) (1982 ed.).
8. Section 20(b) of the Toxic Substance Control Act, 90 Stat. 2041, 15 U.S.C. § 2619(b)(1982 ed.).

STATEMENT OF THE CASE

Petitioners invoked the jurisdiction of the district court under § 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 ("RCRA"), and under 28 U.S.C. § 1331 (federal question).

Petitioners own and reside on a dairy farm located next to the Tillamook County Landfill. Petitioners filed this action to compel respondent Tillamook County to operate its landfill in compliance with the standards and requirements established under RCRA. Petitioners also sought damages from respondent arising from state claims for inverse condemnation, trespass, and nuisance.

On April 20, 1981, petitioners mailed formal notice of their intention to sue respondent Tillamook County to compel compliance with RCRA. Petitioners did not send a copy of this formal notice to the Administrator of the Environmental Protection Agency or Oregon's Department of Environmental Quality ("DEQ"). Excerpt at 17.

On April 9, 1982, petitioners filed the complaint in this case. Petitioners did not name the Administrator or DEQ as parties defendant. *Id.*

On March 1, 1983, respondent filed a motion for summary judgment asking the trial court to dismiss the case because 60 days' advance notice had not been given to the EPA or DEQ. Excerpt at 301; NR. 15.

The next day, on March 2, 1983, petitioners sent a copy of their original notice to respondent to the EPA and DEQ. Excerpt at 17. At the same time, petitioners notified the EPA and DEQ of their intention to refile the citizen's suit if the trial court dismissed the case. ERX. at 61-67.

On April 2, 1983, nine (9) days before the 60-day notice period would have expired, the trial court held that dismissal for failure to give notice to the EPA and DEQ "would be a waste of judicial resources." ERX. at 82. The trial court said in its opinion:

> Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

Id.

Trial began more than two years later on July 23, 1985, and was completed on July 26, 1985. Excerpt at 156. The trial court found that respondent had violated and would continue to violate RCRA, and it ordered respondent to propose a plan that would completely and permanently on July 23, 1985, and was completed on July 26, 1985. Excerpt at 156. The trial court found that respondent had violated and would continue to violate RCRA, and it ordered respondent to propose a plan that would completely and permanently contain leachate generated by the landfill within the landfill boundaries. Excerpt at 155-166. The state claims were tried to a jury, which found for respondent on all three claims.

After the final judgment was entered, petitioners moved for an award of $42,000 in attorney fees and $53,000 in expert witness fees. Excerpt at 181-190. The trial court denied petitioners' motion even though respondent was found to be in violation of RCRA. Excerpt at 228-236.

Petitioners filed a timely notice of appeal to the Ninth Circuit and requested review of the trial court's injunctive relief, the denial of petitioners' motion for attorney and expert witness fee, and certain key evidentiary rulings. Respondent cross-appealed on the 60-day notice question now before the Court.

The Ninth Circuit limited its review to the 60-day notice issue raised by respondent's Tillamook County's cross-appeal. The Ninth Circuit observed that the majority of the seven circuits that had considered the issue had held that 60 days' notice is a procedural, not a jurisdictional, prerequisite for environmental citizen suits. The

difference between the two interpretations is that if the notice provision is procedural, a failure to give notice may be cured by a 60-day stay. If jurisdictional, the case must be dismissed and then refiled after 60 days.

In its opinion, the Ninth Circuit discussed the "pragmatic approach" adopted by the Second, Third, Eighth, and District of Columbia Circuits, and observed that that interpretation underscores the importance of citizen enforcement of federal environmental policies.

The Ninth Circuit decided, however, to adopt the "jurisdictional prerequisite approach" of the First, Sixth, and Seventh Circuits. The Ninth Circuit reasoned that the jurisdictional approach finds support in the plain language of the statute and a perceived policy of allowing the EPA and the State to avoid litigation by investigating and correcting the violation through non-judicial means. The Ninth Circuit said that non-judicial resolution of environmental disputes was more likely in a non-adversarial setting before suit is filed.

Circuit Judge Pregerson dissented. He said that the goal of agency enforcement is served by a 60-day stay of district court proceedings. If the agency has taken no action after 60 days, it would be excessively formalistic to require the district court to dismiss the case and the parties to refile.

Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing en banc. The Ninth Circuit amended its opinion to clarify the effect of its decision on the pendent state claims. The Ninth Circuit held that because the trial court lacked subject matter jurisdiction over the RCRA claim, it also lacked pendent jurisdiction over the pendent state claims.

REASONS FOR GRANTING THE PETITION

1. *The Ninth Circuit's Decision Directly Conflicts With Decisions Of The Second, Third, Eighth, And District Of Columbia Circuits.*

At least eight other environmental statutes contain notice provisions that are identical or similar to that contained in RCRA. As noted in the Ninth Circuit's opinion, courts have interpreted these provisions identically despite slight differences in wording. *Hallstrom V. Tillamook County*, 844 F . 2d 598, 600 (9th Cir. 1987).

The pragmatic approach, used by the Second, Third, Eighth, and District of Columbia Circuits, interprets the notice requirement in federal environmental statutes as procedural, not jurisdictional. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3rd Cir. 1980), cert. denied, 449 U.S. 1096 (1981); *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974). Under the pragmatic approach, a plaintiff's failure to give formal notice to the Administrator and the State before filing a citizen's suit against the alleged violator may be cured by a stay of proceedings for 60 days. A stay gives the EPA or the State enough time to file a n enforcement proceeding in court to compel compliance, thus obviating the need for the citizen suit.

Instead of interpreting the notice provision pragmatically, the Ninth Circuit adopted the jurisdictional prerequisite approach used by the First, Sixth, and Seventh circuits. *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 78 (1st Cir. 1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th

Cir. 1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976). Under the jurisdictional prerequisite approach, if a plaintiff does not give 60 days' notice to the Administrator, the State, and the alleged violator, the case must be dismissed and the plaintiff would be required to refile 60 days after formal notice was given to the Administrator and the State.

The resolution of the 4-4 split among the circuits is the only question presented to this Court. If this Court adopts the pragmatic approach and interprets the 60-day notice provision to be procedural, then the injunction requiring respondent Tillamook County to comply with RCRA will be reinstated. In addition, the Ninth Circuit can then direct its attention to the other issues that petitioners raised on appeal, including the trial court's denial of an award of $95,000 to reimburse petitioners for attorney and expert witness fees they paid in connection with this case.

2. *The Ninth Circuit Decided An Important Question Of Federal Law In A Way In Conflict With A Decision Of This Court.*

The Ninth Circuit's rationale for adopting the jurisdictional prerequisite approach is in conflict with this Court's discussion of a nearly identical notice provision in the Clean Water Act, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (1983 ed. and Supp. III). *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, ____ U.S. ____, 108 S. Ct. 376 (1987).

The Ninth Circuit reasoned that the jurisdictional prerequisite approach should be adopted because (a) citizen's suits burden federal courts, (b) citizen's suits somehow burden the EPA, and (c) the 60-day period allows the EPA and the State to avoid litigation in court:

> This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against *the burdens that such enforcement places on the EPA and the federal courts.* By notifying the EPA and the State of potential legal action, the citizen plaintiff allows them *to avoid litigation by investigating and correcting the alleged violation through non-judicial means.*

Hallstrom v. *Tillamook County*, 844 F.2d at 600 (9th Cir. 1987) (emphasis added).

In contrast, this Court wrote in *Gwaltney* that the 60-day period gives the EPA and the State time to file their own enforcement actions in either federal or state court and the violator time to come into complete compliance. This Court did not in any way suggest that the purpose of the 60-day notice provision was to encourage non-judicial resolution of environmental disputes or to relieve any perceived burden that citizen suits place on the federal courts or the EPA. This Court said:

> Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation "occurs."
>
> * * *
>
> Any other conclusion [*i.e.*, that the violation sought to be addressed cannot be wholly in the past] would render incomprehensible § 505's notice provision, which requires citizens to give 60 days notice of their intent to sue the alleged violator as well as to the Administrator and the State. If the Administrator or State commences enforcement action within that 60 day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an

opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Gwaltney, supra, 108 S.Ct. at 382-83 (citations omitted).

As this Court observed in *Gwaltney*, the only kind of EPA or State Action that can stop a citizen suit is a civil enforcement proceeding filed *in court*. Thus, the Ninth Circuit's concern that a pragmatic interpretation of the 60-day notice provision would not encourage non-judicial resolution misses the point. The statutory framework for RCRA and the other similar environmental statutes assumes that the only kind of non-judicial resolution of the conflict is if the violator brings itself into complete compliance with the statute within 60 days. Otherwise, the violator will face court action either by governmental authorities or by citizens acting as private attorneys general.

Here, of course, the alleged violator was given 60 days' notice before the action was commenced, and the Administrator and the State chose not to file an enforcement action in court within 60 days after they received formal written notice of the pendency of the suit.

Had the Administrator or the State filed an enforcement action in court, dismissal of petitioners' case would have been appropriate. The purpose of the notice provision would have been served, and petitioners then could have intervened as a matter of right. 42 U.S.C. § 6972 (b).

3. *The Question Presented Is Addressed To This Court's Supervisory Power.*

This Court has final responsibility for the proper functioning of the federal judiciary. Accordingly, cases involving the jurisdiction of of the federal courts are appropriate for this Court's consideration. For example, in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), this

Court considered the jurisdictional amount in class actions.

The question presented involves the subject matter jurisdiction of the federal district courts over citizen suits brought to enforce at least nine federal environmental statutes. Exercise of this Court's power of supervision will serve "the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965).

4. *The Question Presented Is Important Because It Involves The Citizen Suit Provisions Of Nine (9) Federal Environment Statutes.*

As noted above, at least nine (9) environmental statutes contain 60-day notice provision identical or substantially similar to that contained in RCRA. All of these notice provisions relate to the role and right of citizens, acting as private attorneys general, to enforce federal environmental policies. Thus, the question presented does not affect only the parties in this case or citizen enforcement of RCRA. The question presented also involves citizen enforcement of the Clean Water Act, the Clean Air Act, the Marine Protection, Research, and Sanctuaries Act of 1972, the Noise Control Act of 1972, the Deepwater Port Act of 1974, the Safe Drinking Water Act, the Surface Mining Control and Reclamation Act of 1977, and the Toxic Substance Control Act.

As noted above, the question presented is the subject of a 4-4 split among the circuits. Indeed, the Ninth Circuit panel that decided this case was split. Two members of the panel adopted the approach of a minority of the circuits, and one member would have adopted the approach of the trial court and the majority of the circuits.

As a result of the Ninth Circuit's decision, a successful citizen suit to enforce RCRA was defeated, and the legislative purpose of encouraging citizen suits to

supplement the limited resources of the EPA and the State was frustrated.

5. *The Ninth Circuit's Decision Is Error Because It Elevates Form Over Substance And Defeats The Purpose Of RCRA Of Encouraging Citizen Enforcement.*

The question presented is one of statutory interpretation. As Justice Stevens noted in his dissenting opinion in *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), the question presented is how the legislature intended the statute to apply to this case:

> In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it had chosen.[1]
>
> 1. "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. ... This is not the substitution of the will of the judge for that of the legislator, for frequently used words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892).

458 U.S. at 577.

Chief Justice Burger said the same thing in *Bob Jones University v. United States*, 461 U.S. 574 (1983):

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.

461 U.S. at 486.

The primary purpose of the citizen suit provisions of RCRA and the other environmental statutes is to protect the environment by citizen suits when the appropriate regulatory agencies lack the human and financial resources to act. In *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), the court, in discussing the Clean Air Act, said:

> In enacting 304 of the 1970 amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.

535 F.2d at 172.

The subsidiary purpose of the citizen suit provisions is to give the violator time to come into complete compliance and the governmental agencies time to control the course of environmental litigation if they file an enforcement action in court in 60 days. *See Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208-09 (4th Cir. 1985) (60-day waiting period gives government opportunity to control course of litigation if it acts within 60 days).

The Ninth Circuit wrote that unless the 60-day notice was interpreted to be jurisdictional, a suit could be filed which would automatically result in positions becoming hardened and relations becoming adversarial so that cooperation and compromise would be less likely. The Ninth Circuit reasoned that an adjustment of the trial date would never restore a 60-day nonadversarial period to the parties. *Hallstrom, supra*, 844 F.2d at 601.

Here, petitioners were never adversaries to DEQ or EPA. Indeed, as noted in Judge Pregerson's dissent, the EPA was content to let the Hallstroms use the citizen suit provision of RCRA to compel compliance. *Id.* at 602.

Furthermore, to require dismissal with refiling after 60 days is not going to soften positions of the actual adversaries. Respondent was given formal notice a full year before this action was filed. During that year, respondent made no improvements to the site and continued to discharge leachate onto petitioners' farm. RT (7/23/85) at 44.

The Ninth Circuit also reasoned that a jurisdictional interpretation to the 60-day notice provision would prevent legal fees from being incurred. 844 F.2d at 601. As noted above, petitioners have spent over $95,000 for attorneys and expert witnesses to compel compliance with RCRA. The trial court found that respondent had in fact violated RCRA since 1981 and would continue to do so. Surely, Congress did not intend the efforts of citizens like petitioners to go uncompensated merely because the EPA and DEQ were not notified until after this case began.

A procedural or pragmatic interpretation serves both the primary and subsidiary purposes of RCRA and the other environmental statutes. There is nothing magic in the filing of a lawsuit that prevents regulatory agencies from filing their own enforcement actions. Thus, a 60-day stay would serve the purpose of the 60-day notice requirement

without disserving the primary purpose of encouraging citizen suits to protect the environment.

Finally, as the court noted in *Susquehanna Valley, supra*, 619 F.2d at 243, "[R]eading [the 60-day advance notice pro-visions of the Clean Water Act] to require dismissal and refiling of premature suits would be excessively forma-listic."

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If the 60-day notice requirement is procedural rather than jurisdictional, this case should be remanded to the ninth Circuit for consideration of the other issues raised on petitioners' appeal.

Respectfully submitted,

Kim T. Buckley
Michael J. Esler
Esler, Stephens & Buckley
101 S.W. Main Street
Suite 1870
Portland, OR 97204-3226
(503) 223-1510

July 6, 1988

APPENDIX

APPENDIX A

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,
v.
TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.
Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ)

before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901 *et seq*. Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

42 U.S.C. § 6972(b)(1) provides:

> No action may be commenced under ... this section ... prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] ...

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island* 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824

(1981). Courts have construed these provisions identically despite slight differences in wording *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700 (D.C.Cir.1974).

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpretations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Counc-il v. Callaway*, F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance*, 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.*,700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council*, 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting

violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton*, 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia*, 761 F.2d at 78. *See also Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir.1975), *cert. denied*, 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia*, 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will.... [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33, 104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction.

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded for dismissal.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to The EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 7002 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced ... under this section ... prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged

violator...." We must decide whether this requirement acts to deprive a district court of jurisdiction over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held that the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir.1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act): *Natural Resources Defense Council V. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 891. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the

agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance*, 619 F.2d at 243.

APPENDIX B

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,

v.

TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.

Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

As Amended on Denial of Rehearing and
Rehearing En Banc April 7, 1988.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

ORDER

The panel voted unanimously to deny the petition for rehearing. The majority of the panel voted to reject the suggestion for rehearing en banc. Judge Pregerson was in favor of granting the suggestion for rehearing en banc.

A call for an en banc vote was made and the case failed to receive a majority of the votes of the active circuit judges in favor of rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

AMENDED OPINION

EUGENE A. WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ) before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901, *et seq.* Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA

and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

42 U.S.C. § 6972(b)(1) provides:

> No action may be commenced under ... this section ... prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] ...

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island* 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981). Courts have construed these provisions identically despite slight differences in wording *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700.

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpre-

tations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Council v. Callaway,* F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance,* 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.,*700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council,* 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton,* 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol,* 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia,* 761 F.2d at 78. *See also Walls v. Waste Resource Corp.,* 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train,*

519 F.2d 681 (7th Cir.1975), *cert. denied,* 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia,* 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will.... [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia,* 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental

disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33, 104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction over the RCRA claim. Because the court lacked federal jurisdiction at the time the suit was filed, it lacked pendent jurisdiction also. The federal court's power to exercise pendent jurisdiction derives from its federal jurisdiction. *See United Mine*

Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Hunter v. United Van Lines*, 746 F.2d 635, 649 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L. Ed.2d 150 (1985).

Without federal jurisdiction, a federal court has no power to hear state claims. *Hunter*, 746 F.2d at 649: "the federal court acquires its power over the [pendent] claim ... only if the court has previously properly been seized of jurisdiction. The federal court's jurisdiction over the state-law claim is entirely derivative of its jurisdiction over the federal claim." (citations omitted).

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded to dismiss and vacate the court's opinion. We reverse the award of fees to the county.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to The EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 6972 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced ... under this section

... prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged violator...." We must decide whether this requirement acts to deprive a district court of jurisdiction over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held that the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 601. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance*, 619 F.2d at 243.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM,
husband and wife, Plaintiffs,
v.
TILLAMOOK COUNTY,
a municipal corporation, Defendant.

CIVIL NO. 82-481

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (MOTION TO DISMISS)

Defendant Tillamook County seeks dismissal of plaintiffs' complaint. The motion is framed as one for summary judgment under Fed. R. Civ. P. 56. However, it is more accurately characterized as one for dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant contends that plaintiffs have failed to strictly comply with the provisions of 42 U.S.C. § 6972 under which they claim subject matter jurisdiction. *See also* 40 C.F.R. § 254.2(a)(2).

Section 6972 of the Resource Conservation and Recovery Act of 1976 (RCRA) provides for sixty (60) days notice of intent to file suit to the Environmental Protection Agency (EPA), to the relevant State authorities, and to the alleged violator. *See* 42 U.S.C. § 6972 (b)(1). Notification is required before individual enforcement action may proceed. *Id.* Tillamook claims that plaintiffs failed to notify either the EPA or the Oregon Department of Environmental Quality (DEQ), prior to the filing of this lawsuit. Because

of this defect, Tillamook argues that plaintiffs lack jurisdiction over them as well.

The purpose of the notice requirement is to allow administrative agencies an opportunity to cure any alleged violations. *South Carolina Wildlife Federation v. Alexander*, 457 F.Supp. 118, 124 (D.S.C. 1978). Defendant Tillamook County received notice from plaintiffs of their intent to file suit in April, 1981. Since then, defendant has done nothing to correct any of the alleged violations. Tillamook has also actively participated in this action since its filing in April, 1982.

Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days form that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

To grant defendant's motion based on the notice provision would be a waste of judicial resources. *Pymatuning Water Shed Citizens v. Eaton*, 644 F.2d 995, 996 (3rd Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Defendants motion to dismiss for lack of subject matter is hereby DENIED.

IT IS SO ORDERED.

DATED this 22 day of April, 1983.

Owen M. Panner
UNITED STATES DISTRICT JUDGE

APPENDIX D

PART 254 — PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

§ 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

§ 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged violator of any permit, standard, regulation, condition,

requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is allegedly to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental

Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) Failure to act. Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of

the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice

(c) Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.